MUTUAL PROMISES AS A CONSIDERATION FOR EACH OTHER.

IN an article in volume VIII. of this REVIEW,[1] upon "Successive Promises of the Same Performance," Professor Williston, speaking of promises made in consideration of the performance, or a promise of performance, by the promisee of an existing contract between himself and a third person, says:[2] "An attempt has been made by some to distinguish unilateral and bilateral agreements. In Professor Langdell's Summary of the Law of Contracts, it is said:[3] 'It will sometimes happen that a promise to do a thing will be a sufficient consideration when actually doing it would not be. Thus, mutual promises will be binding though the promise on one side be merely to do a thing which the promisee is already bound to a third person to do, and the actual doing of which would not, therefore, be a sufficient consideration. The reason of this distinction is, that a person does not, in legal contemplation, incur any detriment by doing a thing which he was previously bound to do, but he does incur a detriment by giving another person the right to compel him to do it, or the right to recover damages against him for not doing it. One obligation is a less burden than two (*i. e.*, one to each of two persons), though each be to do the same thing.' The same distinction is also involved in the discussion of the subject by Sir Frederick Pollock, in the first edition of his treatise on the law of contracts.[4] Sir William Anson, however, pointed out a fallacy in this line of reasoning,[5] in that it assumes that the second promise does impose an obligation upon the promisor. As both parties to a bilateral contract are bound or neither is bound, this assumption involves the further assumption that the second promise is itself a sufficient consideration to support the counter-promise, — the very point in dispute."

"It seems impossible to dispute Anson's criticism of the theory advanced by Pollock and Professor Langdell, but it has not been always observed that the same criticism may be made in the case of every bilateral contract if the test of the sufficiency of consideration is defined, as it usually is, as a benefit conferred upon the

[1] Page 27. [2] Page 34. [3] § 84.
[4] Page 158. [5] Anson, Contracts (1st ed.), 80.

promisor or a detriment suffered by the promisee. To enter into a binding obligation to do or not to do anything whatever is always a detriment, and on the other hand, unless a promise imposes an obligation, no promise whatever can be considered a detriment. It is, therefore, assuming the point in issue to say a promise is a detriment because it is binding. There are but two ways out of the difficulty." [1] Then, after stating the first of these ways, which he rejects, he continues: "The other way is to revise slightly the test of consideration in a bilateral contract, seeking the detriment necessary to support a counter-promise, in the thing promised, and not in the promise itself." "If the test of the sufficiency of consideration be made whether the promisee has incurred a detriment at the request of the promisor (which would constitute a unilateral contract), or has promised something the performance of which will be, or may be, a detriment (which would constitute a bilateral contract), logical consistency is attained. Nor is it attained at the expense of disregarding the authorities." [2] The remainder of the article is devoted to a vindication of this new definition of "consideration."

It will be seen, therefore, that Professor Williston's conclusion is that mutual promises *as such* can never be a consideration for each other. Why? Not because a *binding* promise cannot *as such* be a consideration for another promise (for Professor Williston expressly says every binding promise is a detriment to the promisor, and, therefore, is a sufficient consideration for a counter-promise), but because it is never possible to ascertain whether or not a promise is binding, when the object is merely to ascertain whether it will furnish a sufficient consideration for a counter-promise. Why is it never possible? Professor Williston gives no other reason than his assertion that a promise can never be shown to be a detriment to the promisor without an unwarranted assumption that the promise is binding on him; and of this he is quite sure, for he says there are only two ways out of the difficulty, viz., by saying that the law itself makes such an assumption (which Professor Williston very properly rejects), and by admitting that a promise *as such* can never be a sufficient consideration for a counter-promise. In short, Professor Williston has put forward a novel view of the effects or consequences of "begging the question," viz., first, that it destroys not merely every argument in which it is detected, but also every proposition which has the misfortune

[1] Page 35. [2] Page 36.

to be supported by such an argument, even though such proposition be in fact true; secondly, that the proposition that each of two mutual promises *may* furnish a sufficient consideration to support the other, though confessedly true in fact, can never be proved, except by an argument which is infected with the vice of "begging the question"; and, therefore, in logic and in law, is untrue.

It is chiefly because of this "novel view" that I have felt called upon to answer Professor Williston's article.[1] I say "chiefly" rather than "only," because to assert that a writer, in supporting a given proposition, has assumed the existence of the very thing which he is professing to prove, seems nearly equivalent to asserting that he is either incompetent or dishonest, *i. e.*, that he has either deceived himself, or has attempted to deceive his readers; and if one remains silent under such an imputation, he may seem to admit the justness of it.

I propose, therefore, to show: first, that Sir Frederick Pollock and myself have not begged the question in the passages which have been quoted and referred to; and, if we have, that the only consequence is that we have not proved the proposition which we were supporting, — not that the proposition itself is untrue. Secondly, that, whenever one of two mutual promisors, who is sued upon his promise, claims that the plaintiff's promise, though it be supported by a sufficient consideration, is not binding upon him, and, therefore, is not a sufficient consideration for the defendant's promise, the question thus raised can be put in issue, tried, and decided in the same manner, and with as much facility, as any other question which will be decisive of the cause, and that the defendant must see to it that it is so put in issue, tried, and decided, if he would avail himself of it. Thirdly, that Professor Williston's mode of getting out of the difficulty which he supposes to exist is inadmissible.

Before proceeding to consider these propositions, however, it is proper to place the reader in possession of the views of Sir F. Pollock and Sir William Anson, and to make two or three preliminary observations.

The passage in Sir F. Pollock's book,[2] to which Professor Williston refers, is as follows:[3] "In the case where the party is already bound to do the same thing, but only by contract with a

[1] If it be asked why I have not done this sooner, if I intended to do it at all, I answer that it was not till about a year ago that my attention was first called to the article.

[2] Published in 1876.

[3] Page 158.

third person, there is some difference of opinion. But there seems to be no solid reason why the promise should not be good in itself, and therefore a good consideration. It creates a new and distinct right, which must always be of some value in law, and may be of appreciable value in fact. There are many ways in which B may be very much interested in A's performing his contract with C, but yet so that the circumstances which give him an interest in fact do not give him any interest which he can assert in law. It may well be worth his while to give something for being enabled to insist in his own right on the thing being done. This opinion has been expressed and acted on in the Court of Exchequer,[1] and seems implied in the judgment of the majority of the Court of Common Pleas in a case[2] decided some weeks earlier."[3]

The passage referred to in Sir William Anson's book[4] is as follows:[5] "A more difficult class of cases to reconcile with the general

[1] Scotson *v.* Pegg, 6 H. & N. 295.

[2] Shadwell *v.* Shadwell, 30 L. J., C. P. 145.

[3] Professor Williston says (p. 37) Sir F. Pollock has withdrawn this opinion in his subsequent editions; but I think this is a mistake. In his 6th and last edition (p. 175) Sir F. Pollock says: "In the case where the party is already bound to do the same thing, but only by contract with a third person, there is some difference of opinion. The new promise purports to create a new and distinct right, which, if really created, must always be of some value in law, and may be of appreciable value in fact. B may well be much interested in A's performing his contract with C, but yet so that the circumstances which give him an interest in fact do not give him any interest which he can assert in law. The power to claim A's performance in his own right will then be valuable to him, and why may he not entitle himself to it by contract, and bind himself to pay for it? This opinion has been expressed and acted on in the Court of Exchequer, and seems implied in the judgment of the majority of the Court of Common Pleas in a case decided some weeks earlier." "The reasoning of these cases assumes that a promise to A to perform an existing duty to B is itself enforceable by A, which is not clear on principle, and has not been directly decided" (pp. 176, 177). It will be seen, therefore, that it was only on the supposition that a promise to do what the promisor is already bound to do by a contract with a third person is for that reason invalid, that Sir F. Pollock expresses a different opinion in his last edition from what he expressed in the first. In short, the difference between the first edition and the last is a difference, not in opinion, but in the supposition upon which the opinion is founded. Upon the question whether the plaintiff's promise was invalid, for the reason just stated, he merely says, its validity "is not clear on principle, and has not been directly decided." Moreover, in saying it is not "clear," I understand him to mean no more than that it is not "certain." It may be added that there is high judicial authority to the effect that the promise is valid; for in Scotson *v.* Pegg (*supra*, n. 1) Wilde, B., says: "There is no authority for the proposition, that, where there has been a promise to one person to do a certain thing, it is not possible to make a valid promise to another to do the same thing."

[4] Published in 1879. The first edition of my "Summary of the Law of Contracts" was published later in the same year.

[5] Page 80.

rule are those in which it has been held that a contract is binding which is made in consideration of a performance or promise of performance by one of the parties, of a contract already subsisting between himself and a third party."

"The matter is not very easy to understand upon principle; it has been said[1] that the promise is based on the creation 'of a new and distinct right' for the promisor, in the performance of the contract between his promisee and the third party. But this is in fact to assume that a right is created, which would not be the case if the consideration for the promise were bad."

"Whether the promise is conditional on the performance of the contract, or whether it is given in return for a promise to perform, does not seem to make any difference in principle. If we say that the consideration for it is the detriment to the promisee in exposing himself to two suits instead of one for the breach of his contract, we beg the question, for we assume that an action would lie on such a promise. If we say that the consideration is the promisor's desire to see the contract carried out, we run the risk of confounding motive and consideration."[2]

The whole controversy had its origin in the two English cases of Shadwell *v.* Shadwell and Scotson *v.* Pegg.[3] In each of them, the contract was unilateral, *i. e.*, the consideration of the defendant's promise was the plaintiff's performance (not his promise of performance) of a contract between himself and a third person. In both, the decision was in the plaintiff's favor, it being by two judges against one in the earlier case, and unanimous in the later case. In neither case was the decision based on any distinction, actual or supposed, between a performance and a promise of performance as a consideration for the defendant's promise. These decisions were supported by Sir F. Pollock, and were opposed by Sir W. Anson. In supporting them, however, Sir F. Pollock assumed the consideration of the defendant's promise in each to be, not the plaintiff's performance, but his promise of performance;[4] and, in his last edition,[5] he expresses the opinion, though not strongly, that performance by the plaintiff would not have been a sufficient consideration. Sir W. Anson seems to have supposed

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[1] Pollock, Contracts (1st ed.), 158. [2] Page 81. [3] *Supra*, p. 499, nn. 1 and 2.

[4] Sir F. Pollock also says (p. 176, 6th ed.), Byles, J., in Shadwell *v.* Shadwell, "stated the rule to be that a promise to do what one is already bound, though only to a third person, to do, cannot be a consideration." I do not, however, find any such language in the judgment of the learned judge.

[5] Page 176.

that the consideration was decided to be good, in each of these cases, whether it consisted of the plaintiff's performance or of his promise to perform, while he declares his own opinion to be that the consideration was bad, whether it consisted of the one or the other. He seems to have thought, however, that Scotson *v.* Pegg was in fact a case of mutual promises, for, in stating it, he expressly says,[1] the plaintiff promised performance of the contract between himself and the third person. Lastly, it is clear that Sir W. Anson did not suppose that his criticism of Sir F. Pollock extended to any other cases of mutual promises than those in which one of the promises was to perform a contract between the promisor and a third person; and if he had thought it applied equally to all cases of mutual promises, and that there was no other way of avoiding it than that adopted by Professor Williston, there is no reason to suppose he would have published it.

I now proceed to the consideration of the three propositions already stated: —

I. There is no begging the question in the passages which have been quoted. What was the question? It was whether a promise by one of two mutual promisors to perform a contract between himself and a third person is a sufficient consideration for the counter-promise. This is a particular question or subject, being a part, and a very small part, of the general subject of "Consideration." Indeed, it is only a small part of one branch of the general subject, viz., that branch which is designated by the title of this article. And yet it involves all or most of the fundamental principles, not only of that branch of the subject to which it belongs, but of the entire subject. It is plain, therefore, that, in treating of the particular subject, one cannot state everything upon which it is remotely dependent, and whatever he does not state he must of course assume or take for granted. Moreover, it depends upon circumstances how wide a field one ought to cover. For example, one who is called upon to argue a cause in which the particular subject is directly involved should cover a wider field than one who is writing a treatise, and the width of the field to be covered even by the former should depend, to some extent, upon the amount of instruction supposed to be needed by the court which has the cause to decide. The writer of a treatise should exclude from the particular subject, first, everything which does not come within the scope of his plan; secondly, everything which will more properly find a place in some other part of the treatise

[1] 9th edition, p. 97.

of which the particular subject is a small portion. For example, it was proper for me to exclude from § 84 the more general question whether mutual promises will in any case support each other, as I had already considered that question in § 81. So, also, it was proper for me to exclude from § 84 the question whether the defendant's promise, as well as the plaintiff's, was binding, provided it had a sufficient consideration to support it; for, first, I had already informed the reader in § 82 that, if either of two mutual promises was not binding, the other would be without consideration, and so both would fall to the ground; secondly, the law presumes every promise to be binding which is supported by a sufficient consideration, unless the contrary appear, and, therefore, it presumes both the promises to be binding in the case in question; thirdly, it was no part of my plan to consider in what cases a promise, though supported by a sufficient consideration, will not be binding. What, then, was the object of that part of § 84 which Professor Williston quotes? Simply to state the difference, in the case there put, between performance and a promise of performance, as a consideration for a promise, with the reason for that difference. Everything necessary to raise that question, besides what I stated, of course I assumed to exist, and, therefore, I assumed that each of the promises, if supported by a sufficient consideration, was binding. If, indeed, I had supposed the validity of either promise to be doubtful, I should either have so informed the reader, or I should have omitted § 84; but I did not so suppose then, and I do not now.

As to Sir F. Pollock, the case is still clearer; for he meets directly the only question, respecting the consideration for the defendant's promise, about which it is possible to raise a doubt, viz., whether the plaintiff's promise, if supported by a sufficient consideration, was binding;[1] and he expresses the opinion that it

[1] It seems proper to remark that Sir W. Anson has inadvertently done an injustice to Sir F. Pollock, in making the latter seem to assume the existence of the very thing he was seeking to establish, viz., that the plaintiff's promise, in Shadwell *v.* Shadwell and Scotson *v.* Pegg, furnished a sufficient consideration for the defendant's promise; for, after stating briefly the view of Sir F. Pollock (*supra*, p. 500), Sir W. Anson says: "But this is in fact to assume that a right is created, which would not be the case if the consideration for the promise were bad." Here it is assumed that the right which Sir F. Pollock was considering was the right supposed to be created by the defendant's promise, as to which the question was whether the plaintiff's promise furnished a sufficient consideration to support it. But the right which Sir F. Pollock was in truth considering was the right supposed to be created by the plaintiff's promise, as to which the question was not whether it was itself supported by a sufficient consideration, but whether it constituted a sufficient consideration for the defendant's promise; and

was, and gives his reasons; and even if it should be admitted that some of his reasons tend rather to prove that the plaintiff's promise, if binding, was a sufficient consideration, than that it was binding in fact, it is also true that he was not bound to give reasons at all.

Admitting, however, everything that any one may choose to say as to Sir F. Pollock or myself having begged the question, the utmost that can follow is that we have not proved the proposition which we asserted; and this is all that is claimed by Sir W. Anson. Professor Williston, however, appears to think our failure was due to a cause which will inevitably be fatal to all similar attempts, and, therefore, that the proposition which we maintained is impossible of proof, and so must be deemed false. I must confess my inability even to conjecture what line of reasoning led Professor Williston to such a conclusion; and accordingly I am at a loss how to attack the conclusion itself otherwise than by simply asserting the contrary. Under these circumstances, my most feasible course seems to be to show how the proposition asserted by Sir F. Pollock and assumed by myself, if true, is to be established in a court of justice, whenever the decision of a legal controversy shall involve the question of its truth. Therefore,

II. If one of two mutual promisors be sued upon his promise, and claims that the plaintiff's promise is not binding, and, therefore, is not a sufficient consideration for the defendant's promise, the question thus raised can be put in issue, tried, and decided in the same manner, and with as much facility, as any other question which will be decisive of the cause; and the defendant must see to it that it is so put in issue, tried, and decided, if he would avail himself of it.

(*a*) Whenever an action is brought upon a unilateral contract not under seal, the plaintiff has two things to prove, in order to make out a *prima facie* case, viz., first, that the promise sued on was in fact made, and, secondly, that it was made for a sufficient consideration. Moreover, in order to prove the latter, he must first prove that the defendant offered to make the promise in consideration of the plaintiff's giving or doing some specified thing, and then that the plaintiff gave or did the thing specified by way of accepting the offer.

Having thus proved the making of the promise sued on, and the consideration for which it was made, the plaintiff, in the ab-

that again depended upon whether it was rendered invalid by the fact that the plaintiff was already bound, by a contract with a third person, to do the same thing.

sence of any proof by the defendant, will enforce his claim, unless the court be of opinion that the thing stipulated for by the defendant, and performed by the plaintiff, is, upon its face, an insufficient consideration for the defendant's promise, or that the promise is, upon its face, not binding, even if supported by a sufficient consideration. If the defendant claims the consideration to be insufficient, or the promise not to be binding, upon some ground which does not appear on its face, he must make out his claim by affirmative proof; for example, that the defendant was a married woman, or an infant, when the promise was made, or that the promise was obtained by fraud, or by duress, or that it is void by statute, or is illegal, or that it is within the Statute of Frauds, and the Statute has not been satisfied.[1]

(*b*) If the contract sued on be bilateral, the plaintiff must prove the making of each of the two mutual promises, and also that each promise was made in consideration of the other. The reason is obvious; for it is only by proving the making of his own promise as well as the defendant's, and that each promise was made in consideration of the other, that the plaintiff can prove that the defendant's promise was made for a sufficient consideration. By proving as above, however, the plaintiff will, in the absence of any proof by the defendant, establish his case, unless the court shall be of opinion that one of the mutual promises, even if supported by a sufficient consideration, is not binding. If, however, the defendant claims that either promise is not binding, for some reason which does not appear upon its face, he must make out his claim by affirmative proof, as stated in the preceding paragraph in respect to the defendant's promise.

That a decision in the plaintiff's favor will necessarily involve the proposition that each of the promises is binding upon its face appears by the case of Harrison *v.* Cage.[2] That was an action by a man against a woman upon mutual promises to marry each other. The defendant claimed that such an action could be maintained only by the woman; and the action was confessedly one of first impression. The court, however, was of opinion that every such action brought by a woman, and in which she recovered, established the right of the man to maintain the action, as otherwise there would be no consideration for the man's promise; and so judgment was given for the plaintiff; and the correctness of the decision has never been questioned.

[1] On this subject, I take the liberty of referring the reader to my "Summary of Equity Pleading" (2d ed.), §§ 109–111.

[2] 5 Mod. 411.

That a promise which, upon its face, is binding will support a counter-promise, unless the former be affirmatively proved not to be binding, is shown by Holt *v.* Ward.[1] That also was an action upon mutual promises by the plaintiff and defendant to marry each other. The defendant pleaded that the plaintiff, when she made the promise, was an infant of fifteen years of age, and the plaintiff demurred to the plea. By so demurring, the plaintiff admitted the truth of the plea, and raised the question whether her promise was not a sufficient consideration for the defendant's, notwithstanding she was an infant; and the court held that it was. If the plaintiff had taken issue on the truth of the plea, of course the defendant must have proved it, or it would have gone for nothing.

So, if the consideration of a defendant's promise consist either in the plaintiff's doing, or in his promising to do, what he was already bound to do by a contract with a third person, the defendant may, by affirmatively proving that the plaintiff was so bound, raise the question whether there was a sufficient consideration for his promise; and the decision will depend upon the judgment of the court on that question.[2] In the absence, however, of proof by the defendant, the plaintiff will recover.

I have said that when an action is brought on a bilateral contract not under seal, the plaintiff must prove the making of each promise, and also that each promise was made in consideration of the other. How can he do this, according to Professor Williston's view? He has four things to prove, each of which is entirely independent of all the others. While, therefore, he is proving the first, he must assume the other three to be true, and, while he is proving the second, he must assume the third and fourth to be true, and so on; and yet I understand Professor Williston to be of opinion that the writer of a treatise cannot assume one of two independent things to be true for the purpose of establishing the other.

III. Professor Williston's proposed change in the definition of consideration is not admissible.

By reference to the extracts already made from Professor Williston's article,[3] it will be seen that he does not propose to abolish the distinction between giving and doing and promising to give or do, as a consideration for a promise, by making the giving or doing

[1] 2 Str. 937.

[2] Shadwell *v.* Shadwell, 9 C. B., N. S., 159, 30 L. J., C. P., 145, and Scotson *v.* Pegg, 6 H. & N. 295, are both authorities for what is stated in the text.

[3] *Supra*, p. 497.

of something the consideration in all cases; and he will doubtless agree that that distinction cannot be abolished, as the consideration of a promise must always be strictly contemporaneous with the promise itself; while, in the case of a bilateral contract, there is no giving or doing on either side till after the making of the promises, and the only thing that is contemporaneous with either promise is the counter-promise. In truth, the only difference between the received definition and Professor Williston's proposed definition seems to be this: according to the received definition, a promise is a sufficient consideration for a counter-promise, if it is binding, while, according to Professor Williston's proposed definition, a promise is a sufficient consideration for a counter-promise, if performance of the thing promised would be a sufficient consideration for a unilateral promise. Is such a change admissible? I think not.

(*a*) The sufficiency of a promise, regarded as the consideration of another promise, must depend upon the nature, quality, or legal effect of the promise itself; for the promise is all that the promisor gets in exchange for his promise, and is all that the promisee parts with. Performance and the right to performance must not be confounded. The promisor may get the latter at the time of his promise, but he cannot possibly get the former, unless his promise be unilateral; and it is wholly uncertain whether he will ever get it. Performance, therefore, in the case of a bilateral contract, is both future and uncertain; and hence, as it cannot constitute the consideration for either promise, so it cannot constitute the reason why either promise may be a consideration for the other promise. A binding promise is, moreover, while it lasts, a substitute for the performance promised, and the latter, if it takes place, operates simply as a satisfaction and discharge of the former. The two, therefore, can never co-exist, for, the moment performance takes place, the promise ceases to exist.

(*b*) Professor Williston's proposed change will confessedly have the effect of rendering mutual promises invalid in every case in which the thing promised by either party would not be a sufficient consideration for a unilateral promise; and yet it is assumed that each promise, if unilateral, and made for a sufficient consideration, would be valid and binding. How does Professor Williston reconcile this with his own statement that every binding obligation is a detriment to the obligor, and, therefore, that each of the mutual promises, in the case supposed, being supported by a sufficient consideration, is valid and binding? Moreover, how does he sup-

pose a court of justice can knowingly perpetrate such an injustice as his proposed change would involve? There seems to be but one possible answer, viz., that, according to Professor Williston's view, it can never be known, when mutual promises are the subject of an action, whether the plaintiff's promise is binding or not; and, therefore, that it must be assumed not to be binding. Such an answer, however, would be a confession that the admissibility of Professor Williston's proposed change depends upon the soundness of his reasons for thinking some change necessary.

(*c*) Professor Williston's proposal makes every promise, whether binding or not, a sufficient consideration for a counter-promise, provided only a performance of the thing promised would be a sufficient consideration for a unilateral promise. Suppose then a married woman enters into a bilateral contract for the purchase of a house. Except for the fact that the purchaser is a married woman, the contract is open to no possible objection, but that fact alone renders both promises void. Yet both promises fully meet Professor Williston's requirement, and, therefore, according to him, each promise is supported by a sufficient consideration; and the consequence is that the seller's promise is valid and binding, while that of the purchaser is void, not for want of consideration, but because made by a married woman. In truth, Professor Williston, while dispensing with the requirement that mutual promises, in order to be a consideration for each other, must be binding, provides no substitute whatever for that requirement; for it is of course idle to say that a promise is a sufficient consideration because of what it promises, if it furnishes no security whatever that the thing promised will be performed. Nor is it here open to Professor Williston to say that the nullity of the purchaser's promise is a thing which can never be known; for if the purchaser should defeat an action against her by the seller, on the ground that her promise was void, the court could not shut its eyes to the fact that an action by her against the seller would have been successful, at least so far as regarded the sufficiency of the consideration for the seller's promise. So if the purchaser should file a bill for specific performance, proof by the seller that the purchaser was a married woman when the contract was made would be a complete defence to the bill.

Professor Williston's conclusion is that neither doing nor promising to do what one is already bound, by a contract with a third person, to do is a sufficient consideration for a promise; and he seems to regard it as one of the merits of his definition of "consid-

eration" that it gives the same rule for both these classes of cases, for he says it is certainly "of doubtful expediency to establish so delicate a distinction between bilateral and unilateral contracts"[1] as that between doing and promising to do, in the cases in question. This last remark seems to imply that distinctions in law between unilateral and bilateral contracts are unusual; for if they are in fact so numerous as to be the rule rather than the exception, and if many of them are so wide and radical as to pervade nearly the whole subject of contracts, then surely one "delicate" distinction, more or less, cannot be very material. What, then, is the fact? It is not too much to say that there is no division of contracts, not even the time-honored one into contracts under seal and contracts not under seal, which is comparable in legal importance with the division into unilateral and bilateral contracts. Moreover, the division of "consideration" into that which consists in giving or doing and that which consists in promising to give or do, corresponds precisely and perfectly, so far as regards all contracts which require a consideration, viz., contracts not under seal, with the division of the latter into unilateral and bilateral contracts; for the consideration of every unilateral contract or promise consists in giving or doing, while the consideration of each of the promises in every bilateral contract consists in promising to give or do. In other words, that which is the consideration of every unilateral promise can never be the consideration for either of the promises in a bilateral contract, and that which is the consideration for each of the promises in every bilateral contract can never be the consideration for a unilateral promise. How then can it be said that one is drawing a "delicate" distinction when he says (with Professor Williston) that every binding promise to give or do is a detriment, and, therefore, a sufficient consideration for a counter-promise, but that giving or doing is not always a detriment, and hence is not always a sufficient consideration for a unilateral promise? Whether "delicate" or not, however, the propriety of making the distinction depends wholly upon whether it actually exists; and the way to solve that question is, not to seek for the points in which giving or doing and promising to give or do resemble each other, but to inquire as to each, separately and independently of the other, whether and why it contains the legal requisites necessary to make it a sufficient consideration for a promise. When this has been done satisfactorily, everything else will take care of itself.

C. C. Langdell.

[1] Page 37.